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## THE CONTINUING VITALITY OF TRIBAL SOVEREIGNTY UNDER THE CONSTITUTION

Erik M. Jensen\*

Imagination is a wonderful thing. Close your eyes, and you can walk through the looking glass into a new, and perhaps better, world. I read James A. Poore III's essay, *The Constitution of the United States Applies to Indian Tribes*,<sup>1</sup> as such an enjoyable flight of fancy.

Mr. Poore might be right that the United States would be a better place if constitutional limitations applied in full force against tribal governments, just as those limitations apply to federal and state governments. Both tribal members and non-members could then invoke those protections against tribal governments in tribal courts, and federal judges would be able to review the constitutional rulings of those courts.<sup>2</sup>

But that is not the law, and it has never been the law. I am not a cultural relativist; I too am willing to defend the superiority of American constitutional principles. But Poore's evidence does not come close to making out a case that tribes have lost all aspects of their traditional sovereignty or that tribal power is limited by the Constitution in the way he suggests. Poore has neither modern Supreme Court jurisprudence nor modern congressional understanding on his side.

In Part I, I defend tribal sovereignty against Mr. Poore's attack. In Part II, I challenge a few specific points that Poore makes along the way, points he incorrectly marshals in support of the proposition that tribal sovereignty died long ago. In Part III, I consider whether Mr. Poore's conception of American Indian law might be in our future, even if it is not part of our past.

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1. 59 MONT. L. REV. 51 (1998).

2. *Id.* at 79. Poore writes that federal courts should at least have the power to enjoin tribal actions.

## I. A GENERAL DEFENSE OF TRIBAL SOVEREIGNTY: HISTORY TRUMPS LOGIC

Poore asks rhetorically, "How can it be that within the borders of the United States, citizens – both Indian citizens and non-Indian citizens – of the United States may be subject to unconstitutional actions by tribal governments and tribal courts?"<sup>3</sup>

As I understand him, Poore's basic contention is that tribal sovereignty is a dinosaur. It existed once, but it disappeared long ago. Tribal power today is entirely a consequence of congressional delegation.<sup>4</sup> Although we might speak of this delegated power as "sovereign," says Poore, we should stop pretending that tribes are true sovereigns immune from constitutional dictates: "[B]y virtue of their assimilation into the United States, Indian tribes have lost all their retained powers that are inconsistent with the rights of citizens of the United States."<sup>5</sup> The prevailing understanding of the relationship of tribes to the Constitution is therefore wrong: "The perception that the Constitution does not apply to Indian tribes is derived from the assumption that Indian tribes have retained some element of their original sovereignty."<sup>6</sup>

"Perception"? "Assumption"?

The fundamental problem with Poore's position is that the existence of what he calls "retained sovereignty" – the sovereignty attributable to the tribes' pre-constitutional status – is far more than an assumption. It is the law of the land. As Felix Cohen put it in 1942, in a passage that has been blessed by the Supreme Court, "Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are law-*

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3. *Id.* at 51. A niggling point: This is a peculiar way to put the question. The actions Poore has in mind are unconstitutional only to the extent that the Constitution applies in the way he says it does. If the Constitution does not work that way, then, by definition, the actions are not unconstitutional. Actions in French courts that do not satisfy American constitutional standards are not "unconstitutional."

4. *Id.* at 53-54.

5. *Id.* at 53. Tribes do have power, Poore concedes, and we might use the term "sovereignty" to refer to that power. But this sovereignty, Poore argues, has nothing to do with the tribes' antedating the Constitution:

[T]he retained sovereignty that tribes lost by integration into the United States and by congressional action has been replaced, in part, by sovereign powers granted to tribes by Congress. The sovereign powers that tribes now possess, including inherent powers [i.e., those necessary to implement specific powers that have been granted], flow from congressional action and are therefore subject to the Constitution.

*Id.* at 55.

6. *Id.* at 53.

*fully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*"<sup>7</sup>

The Cohen principle is not self-evident, of course, and anyone can knock logical holes in the idea that tribes are sovereign. Poore does that job perfectly well.

For example, from a logician's perspective, it seems peculiar indeed for Indian law scholars and practitioners to talk simultaneously about tribal "sovereignty" and about the federal plenary power doctrine – the idea that American Indian tribes are ultimately under the control of Congress. The plenary power doctrine, Poore suggests, "subjects tribes' retained sovereignty to complete defeasance,"<sup>8</sup> and it is reasonable to question what sovereignty means if someone else can snap his fingers and make the sovereign power disappear.<sup>9</sup>

Adding to the conceptual difficulty is the idea that the federal government has a fiduciary obligation to protect the tribes. The so-called "trust" doctrine comes from one of the cases in the famous John Marshall trilogy.<sup>10</sup> How is the notion of the United States government as "guardian" of the Indian "ward" – Justice Marshall's terms<sup>11</sup> – consistent with the idea of retained sovereignty?

Those are perfectly good questions, but they are irrelevant to the ultimate practical issue. We talk about both sovereignty and federal plenary power, about both sovereignty and the United States' obligations as trustee for the tribes, because the

7. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (photo. reprint 1971) (1942) (emphasis in original); see *United States v. Wheeler*, 435 U.S. 313, 322 (1978). That the passage has been blessed does not mean that its effect on a particular set of facts is clear or that all members of the Court accept the proposition. Dissenters have quoted Cohen to make the point that the majority in particular cases has not understood this "most basic principle." See, e.g., *South Dakota v. Bourland*, 508 U.S. 679, 698 (1993) (Blackmun, J., dissenting).

8. Poore, *supra* note 1, at 53.

9. I do not mean to suggest that everyone accepts the legitimacy of the plenary power doctrine, particularly in its most expansive form. Furthermore, those Indian law scholars who recognize the doctrine's reality generally do so reluctantly. See, e.g., Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

10. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-18 (1831). *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), complete the trilogy.

11. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . .").

way Felix Cohen described things is the way things are. Being a "sovereign" does not mean being all-powerful, just as the "plenary" power of Congress has its limits.<sup>12</sup> The retained sovereignty of Indian tribes is circumscribed, but it exists.<sup>13</sup> That tension in the conception of American Indian tribes – sovereign in some ways but subject to congressional control as well – is part of the fabric of American Indian law.<sup>14</sup>

This built-in tension at the core of American Indian law does not cripple the discipline. It shows only that determining the status of American Indian tribes is not an exercise in logic-chopping.<sup>15</sup> Life and the law are full of anomalies that will not satisfy a logician. So what?

To Poore, because tribes do not fit easily into a pristine constitutional structure, logic points to the tribes' being, at most, subdivisions of the federal government.<sup>16</sup> At the other extreme, I suppose, the tribes could be treated as distinct foreign nations, immune from constitutional constraints, but that has not been the accepted conception of tribes for years.<sup>17</sup>

For Poore, there is apparently no middle ground. But why should that be so? It is far too late in the day to conclude that the special status of American Indian tribes does not exist simply because it does not always make perfect sense. The special status is there, it has been recognized for decades, and, for better or worse, it is not simply going to go away.

12. See Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 418 (1988).

13. Cf. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53 (Thompson, J., dissenting) (stressing that weaker states do not lose sovereignty simply because they align themselves with more powerful ones).

14. *Worcester*, 31 U.S. (6 Pet.) at 561, which held that Georgia's criminal laws had no effect within the boundaries of Indian country, can be interpreted as either a statement of the importance of tribal sovereignty or as a statement of federal preemption of state power. In *Worcester*, the doctrines led to the same result, and the inherent tension between the two doctrines was not apparent. But the tension *was* there, and it remains to this day.

15. I do not mean to suggest that logic plays no role (and no, I am not going to cite Holmes on the insignificance of logic in the law).

16. "Subdivision" may be too strong a word, but I am trying to make conceptual sense of these bodies that, according to Poore, "derive their power from the federal government," Poore, *supra* note 1, at 75, and are limited by the Constitution in the same way as the federal government.

17. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-20 (1831) (concluding that tribes are nations but not foreign nations). My impression is that even the strongest tribal proponents do not go so far today. Few really want the United States to cut all ties to the tribes and allow the tribes to make it – or not make it – on their own. See Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385, 394-95 (1993).

Of course, under the federal plenary power doctrine, Congress could make much of that special status disappear. As Poore writes, "Congress has the power to eliminate any retained sovereignty of Indian tribes that is inconsistent with the Constitution."<sup>18</sup> Nevertheless, notwithstanding Poore's revisionist understanding of American Indian law, that has not happened explicitly. And, even with a late 1990's Congress that is less sympathetic to tribal interests than some of its predecessors have been, such a step does not seem to be in the offing.

Part of Poore's proof that sovereignty has already disappeared involves reasoning from a handpicked selection of Supreme Court cases, discounting the multitude of cases that do not fit his thesis. In American Indian law, one can "prove" almost any proposition by picking the right case or statute as a starting point; much Indian law doctrine does not mesh.<sup>19</sup> And, yes, there have been Supreme Court cases that can reasonably be interpreted as denying the existence of any form of tribal sovereignty.<sup>20</sup> But even the recent cases that seem to have downplayed sovereignty – relegating it to a "backdrop" against which questions of preemption are evaluated, for example<sup>21</sup> – have not said that tribal sovereignty has ended.

When we step back to look at the big picture, the body of Supreme Court jurisprudence in American Indian law, it is impossible to conclude that a Court which regularly refers to tribal sovereignty has read retained sovereignty out of the canon.<sup>22</sup>

18. Poore, *supra* note 1, at 55. Implicit in this statement is the proposition that some aspects of retained sovereignty may be *consistent* with the Constitution.

19. The apparently diametric underpinnings of cases from the same era can be striking. Compare, e.g., *Ex parte Crow Dog*, 109 U.S. 556 (1883) (stressing tribal power of self-government), with *United States v. Kagama*, 118 U.S. 375 (1886) (stating that only two sovereigns, the U.S. and the states, can exist in the U.S.).

20. See, e.g., *Kagama*, 118 U.S. at 379 ("The soil and the people within [the geographical limits of the U.S.] are under the political control of the government of the United States, or of the states of the Union. There exist within the broad domain of sovereignty but these two."); see Daniel L. Rothenberg, *American Indian Tribal Death – A Centennial Remembrance*, 41 U. MIAMI L. REV. 409 (1986) (characterizing *Kagama* as death of tribal sovereignty). But see *Kagama*, 118 U.S. at 381-82 (noting that while tribes do not possess "full attributes of sovereignty," they are "a separate people with the power of regulating their internal and social relations . . .").

21. The phrase originated in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). See also *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 884 (1986).

22. Poore admits that "a number of Supreme Court cases indicate . . . that Indian tribes have retained sovereignty to some extent with respect to various issues," but he says this is "generally in dicta." Poore, *supra* note 1, at 53-54 n.11. Moreover, he states that "there do not appear to be any cases in which the Supreme Court has specifically determined that the retained sovereignty has survived the congressional and other actions discussed in this article." *Id.*

Backdrops have effects, sometimes very important effects.<sup>23</sup>

The case that, in my opinion, presented the Court with the best opportunity to embrace the Poore thesis was *Oliphant v. Suquamish Indian Tribe*,<sup>24</sup> concluding in 1978 that tribes do not have criminal jurisdiction over non-Indians.<sup>25</sup> *Oliphant* was hardly the product of a Court sympathetic to strong tribal interests. Moreover, it was a case in which the Court was influenced by some of the same factors that concern Poore, particularly the lack of constitutional protection of defendants' rights in tribal courts.<sup>26</sup>

In *Oliphant*, therefore, the Court could have announced the demise of tribal sovereignty and could have stated that, if tribal courts are to exercise criminal jurisdiction at all, constitutional limitations must bind those courts. Nothing like that happened. Although some language in *Oliphant* makes tribal supporters cringe – tribes have lost not only those powers that Congress has explicitly taken away, but also those powers “inconsistent with their status”<sup>27</sup> – the Court did not say that tribes have lost

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I am not sure what to make of those statements. I guess it is true that no recent case has specifically ruled, up-or-down, on the continued existence of tribal sovereignty. But that is hardly surprising. Why would the Court discuss such a non-issue?

Moreover, in many cases, particularly those involving the application of state law within Indian country, tribal sovereignty and federal preemption point in the same direction – keeping the state out. See Laurence, *supra* note 12, at 418. The fact that it may be impossible to determine how much of a decision was attributable to retained sovereignty and how much to federal preemption does not mean that a reference to sovereignty is dictum or that sovereignty is a meaningless concept. See *infra* note 23.

23. If nothing else, the backdrop of sovereignty has meant that state power is presumed not to apply to tribal members in Indian country. That is not a trivial proposition. See, e.g., *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (treating backdrop as presumption that state lacks power over tribal members within reservation boundaries); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (stating that backdrop of sovereignty means that “questions of pre-emption . . . are not resolved by reference to the standards of pre-emption that have developed in other areas of the law . . .”).

24. 435 U.S. 191 (1978).

25. See *id.* at 212. The boundaries of *Oliphant* were unclear for several years because the Court was not careful in its language. Did the Court mean to preclude jurisdiction over nonmembers of the tribe – a category that could include Indians who are members of other tribes – or only over non-Indians? That issue was resolved in *Duro v. Reina*, 495 U.S. 676, 688 (1990) (holding that tribal court had no jurisdiction over Indian defendant not a member of the host tribe). Congress later intervened, permitting tribal court jurisdiction over Indians generally. See Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1991) (codified at 25 U.S.C. §§ 1301(2), (4) (1994)).

26. See *Oliphant*, 435 U.S. at 211-12. The Court's concerns about the lack of procedural protections were made even clearer in *Duro*, 495 U.S. at 693-96.

27. *Oliphant*, 435 U.S. at 208 (emphasis added).

all sovereign powers. Quite the contrary. The Court's conclusion – preserving tribal criminal jurisdiction over members except insofar as Congress has taken that power away,<sup>28</sup> while precluding tribal exercise of criminal jurisdiction over non-Indians in the absence of congressional action<sup>29</sup> – makes no sense if the Court thought that full constitutional protections for criminal defendants were already a necessary component of the tribal court system.

So the Supreme Court does not think that sovereignty has disappeared.<sup>30</sup> Neither, apparently, does Congress; modern Congresses have been acting as though Indian tribes occupy a special constitutional position in America.<sup>31</sup> Poore suggests that prior congressional enactments – particularly the 1924 act extending citizenship to previously unnaturalized American Indians,<sup>32</sup> the Allotment Acts of the late nineteenth century, which pointed to termination of the tribes and citizenship for tribal members,<sup>33</sup> and the Indian Appropriations Act of 1871, which ended treaty-making with the tribes<sup>34</sup> – effectively elimi-

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28. That conclusion is implicit in the body of *Oliphant*, and was made explicit in *Duro*, 495 U.S. at 694 (“Retained criminal jurisdiction over members is accepted by our precedents . . .”). The *Duro* Court justified jurisdiction over members because of the voluntary membership of the tribes, and concluded that *Oliphant's* logic precluded jurisdiction over nonmembers, even if they are Indians. *Duro*, 495 U.S. at 691-92. But see Poore, *supra* note 1, at 60 (criticizing voluntary membership theory).

29. The Court suggested that Congress could permit criminal proceedings against nonmembers in tribal court. *Oliphant*, 435 U.S. at 212. Perhaps I am reading too much into his opinion, but Justice Rehnquist seemed to be hinting that Congress could take that step without providing for constitutional protections in tribal courts. See *id.* at 210 (“Indian tribes . . . gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”). And Congress has acted to permit tribal court jurisdiction over Indians who are not members of the host tribe, apparently not seriously concerned about constitutional issues arising from that jurisdiction. See sources cited *supra* note 25.

30. Just last term, the Court reemphasized the continued existence of tribal sovereign immunity. See *Kiowa Tribe v. Manufacturing Techs., Inc.*, 118 S. Ct. 1700 (1998). Although sovereign immunity may often be unimportant, in that sovereigns can and often do waive that immunity, it remains an aspect of sovereignty.

31. See, e.g., *infra* notes 36-37 and accompanying text.

32. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1994)).

33. Most important was the General Allotment Act of 1887 (popularly known as the Dawes Act), ch. 119, 24 Stat. 388 (codified throughout title 25 of the United States Code). Poore characterizes the Allotment Acts as “a *de jure* elimination of retained powers of tribes.” Poore, *supra* note 1, at 63 (footnote omitted).

34. Act of March 3, 1871, ch. 120, 16 Stat. 544, 566; see Poore, *supra* note 1, at 66 (“tribes were no longer regarded as sovereign nations.”). Poore construes this Act as having diminished tribal status, but, in fact, the existing treaties continued in force. See 16 Stat. at 566 (“[N]othing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian



nated retained sovereignty: "traditional constitutional law principles, including equal protection, would require that when Congress granted citizenship to all Indians, it eliminated any power or retained sovereignty of tribes inconsistent with the Constitution."<sup>35</sup> That must be news to Congress.

How, for example, can Poore explain something like the Indian Civil Rights Act of 1968, which imposes by statute many (but not all) of the protections contained in the Bill of Rights?<sup>36</sup> Among its provisions, ICRA contains a prohibition against "unreasonable search and seizures," a double jeopardy clause, a right against self-incrimination, a due process and equal protection provision, and a right to a jury trial in criminal cases that could lead to imprisonment. Congress obviously did not think that the Bill of Rights already limited the powers of Indian tribes. If Congress had thought that, ICRA would be surplusage.<sup>37</sup>

Poore must think that the Court and Congress are both blind to the logical implications of what they have done. He sees the logic that those bodies cannot; sovereignty is dead even though Congress and the Supreme Court fail to realize it.<sup>38</sup>

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nation or tribe."). The common understanding of the end of treating with the tribes is that the House of Representatives, which does not participate in treaty-making, wanted to play a more significant role in the formation of Indian policy. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 151-52 (4th ed. 1998).

35. Poore, *supra* note 1, at 61.

36. See Act of April 11, 1968, Pub. L. No. 90-284, §§ 201-203, 82 Stat. 73, 77-78 (codified at 25 U.S.C. §§ 1301-1303 (1994)). Among the exceptions: ICRA contains no Establishment Clause. It has been assumed, that is, that a tribe may have an established religion. Although Poore does not address this issue directly, I take it he thinks a tribal establishment of religion would be improper, whatever ICRA says or does not say. But tribal religions are generally very different from the more mainstream, establishment religions; there is a much stronger sense that *everything* has religious significance. See, e.g., *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting) ("[F]or Native Americans religion is not a discrete sphere of activity separate from all others. . ."). What would be left of traditional tribal religions if the Establishment Clause were imposed on tribes? How could a tribe establish a wall between church and state when "church" permeates all of life?

37. To be sure, ICRA has turned out to be largely surplusage anyway, since the Supreme Court has ruled that Congress did not waive sovereign immunity in enacting ICRA. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). As a result, persons harmed by tribal officials have no recourse in federal court, except in habeas actions. See *id.* at 58. But *Santa Clara* actually supports one of my points: the Court's refusal to read an implicit waiver of sovereign immunity into ICRA is strong evidence that the Court does not view tribal sovereignty as a dead letter.

38. I take it that is Poore's point when he argues that Congress' attempt to "revive" sovereignty in 1934, with the enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (1994)), was necessarily a failure. See Poore, *supra* note 1, at 69. Congress cannot enact "retained" sovereignty.

That is possible, of course, and the law reviews are full of essays that are exercises in redefinition: "The cases really mean X when they say Y," or "Whatever Congress intended, statute Z does such-and-such."

But Poore's efforts go beyond – far beyond – the usual essay. He is not arguing that doctrine Y within American Indian law is wrong; he is suggesting that *the courts and the Congress have misconstrued the premises of the entire body of American Indian law*. That is a claim of awe-inspiring magnitude. It is as if he were suggesting that judicial review is not the law of the land.<sup>39</sup> To reorient American Indian law in that way, we need a much clearer statement of congressional purpose than Poore has been able to find.

In short, whatever the merit of Poore's logic, it is a logic that the Supreme Court and Congress have not accepted. The current state of American Indian law and policy was not inevitable; it did not develop solely as a matter of logic. But it is no less real for all that. Like it or not, Indian tribes have a special constitutional status.

## II. A FEW SPECIFIC POINTS

I have tried to suggest why Poore's grand argument is misguided. A few more specific points deserve brief rebuttals as well. First, Poore overstates the extent to which actual assimilation occurred in the past. Second, he exaggerates the constitutional significance of tribal nonmembers' residing in Indian country. Finally, he overemphasizes the importance of citizenship in constitutional law.

Point one: Poore argues that retained sovereignty was eliminated in the past and, once that happened, it was gone forever. With sovereignty gone, "Congress started with a clean slate."<sup>40</sup> And when Congress "resurrected tribes, Congress necessarily imposed the Constitution."<sup>41</sup>

Poore sees "resurrection" rather than revival because he

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Once abolished, it is gone forever.

39. I do not mean to suggest that scholars ought not reconsider the merits of judicial review in general and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in particular. Of course they should. I have a colleague who, as far as I can tell, devotes about ten weeks of his constitutional law course to *Marbury*. But an article claiming not that *Marbury* was wrong, but that judicial review is not the law today, would strain the imagination.

40. Poore, *supra* note 1, at 69; see also *supra* note 38.

41. Poore, *supra* note 1, at 80.

exaggerates the extent to which tribes had disappeared before the Indian Reorganization Act of 1934 reinvigorated tribal governments.<sup>42</sup> He regularly uses words like "assimilation" and "integration" to describe not just the goals of federal policy during various periods of American history, but also what actually happened to American Indian tribes.<sup>43</sup>

He is wrong. Although federal Indian policy was often assimilationist in intent, it is not the case that "Indians and Indian reservations were integrated and assimilated into the United States by congressional, judicial, and other actions."<sup>44</sup> Indeed, when tribes were officially revived in 1934, following the devastating disclosures about reservation conditions contained in the Meriam Report,<sup>45</sup> it was in part because it had become clear that assimilation had not occurred *and perhaps would never occur*.<sup>46</sup>

Point two: Poore is concerned about people who live within Indian country but who, because they are not tribal members, cannot play a full role in tribal government. He refers to "the basic constitutional requirement that citizens be allowed to vote for those individuals their [sic] govern our lives."<sup>47</sup> Whatever that principle is, it was not a "basic constitutional principle" for women until 1920,<sup>48</sup> for eighteen-year olds until 1971,<sup>49</sup> or for kids under eighteen today. And I can think of a lot of people who affect my life for whom I cannot vote.<sup>50</sup>

42. See Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (1994)).

43. See, e.g., Poore, *supra* note 1, at 54 (text accompanying note 1).

44. *Id.* at 53.

45. See BROOKINGS INSTITUTION INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (photo. reprint 1971) (1928).

46. The Meriam Report concluded that assimilation had not happened for all tribes: "Some Indians proud of their race and devoted to their culture and their mode of life have no desire to be as the white man is." *Id.* at 86. If assimilation was unlikely, federal policy needed to change:

The object of work with or for the Indians is to fit them either to merge into the social and economic life of the prevailing civilization as developed by the whites or to live in the presence of that civilization at least in accordance with a minimum standard of health and decency.

*Id.* Justice McLean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 563 (1832), predicting the ultimate demise of the tribes, is hardly evidence of actual events. But see Poore, *supra* note 1, at 58 (quoting McLean opinion at length).

47. Poore, *supra* note 1, at 76.

48. See U.S. CONST. amend. XIX.

49. See U.S. CONST. amend. XXVI.

50. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978) (rejecting argument that residents of unincorporated community outside Tuscaloosa, who were

Consider this sentence: "Where tribal governing bodies purport to make laws or rules that impact non-members residing within the confines of a reservation, then the Constitution requires that non-members be allowed to vote in elections and to run for office."<sup>51</sup> Where does the Constitution say that?<sup>52</sup> Is an Ohio citizen who resides in Florida for all or part of the year entitled to vote in Florida?<sup>53</sup>

It is true that a difference of potentially constitutional dimension is that Ohio citizens can take steps to shift their citizenship to Florida, while membership in tribes is limited – and limited by race.<sup>54</sup> But the law is as clear as it can be that the racial policies of American Indian tribes present no constitutional problems.<sup>55</sup>

Point three: Poore attaches extraordinary significance to the various legislative acts that culminated in the 1924 enactment under which Congress made previously unnaturalized American Indians U.S. citizens.<sup>56</sup> In his view, citizenship fundamentally changed the Indians' relationship to the American polity.

Yes and no. Yes, the 1924 statute was important, effectively conferring on American Indians the right to vote in federal and state elections,<sup>57</sup> and opening up the possibility of running for federal offices for which citizenship is a requirement.<sup>58</sup>

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subject to Tuscaloosa police and sanitary regulations, were entitled to vote in Tuscaloosa elections).

51. Poore, *supra* note 1, at 77. Congress was "precluded from providing for the creation of any tribal governments or tribal judicial systems that do not comport with the Constitution of the United States. Because of the *de facto* integration of Indian and non-Indian cultures on reservations, to the extent that Congress has not acted or has not acted properly, the Constitution is self-implementing." *Id.* at 54. Even if Poore were right about this principle, I take it that closed reservations, where there is no significant non-Indian population, might be governed by different standards.

52. The Supreme Court has been most careful in protecting the voting rights of residents. See *Holt Civic Club*, 439 U.S. at 68-69. But the Court has never said that residence itself entitles a person to vote. See *id.* at 69 ("Bona fide residence alone . . . does not automatically confer the right to vote on all matters . . ."); see also *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (rejecting right-to-vote claim by nonlandowner residents of special water district).

53. He might have to pay Florida as well as Ohio taxes, but that fact alone does not entitle him to vote in Florida as a constitutional matter.

54. See Poore, *supra* note 1, at 77.

55. See *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974).

56. See *supra* note 32 and accompanying text.

57. Constitutionally protected voting rights apply to citizens. See U.S. CONST. amends. XV, XIX, XXIV, XXVI.

58. Representatives, senators, and the president must be citizens. See U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5.

On the other hand, the extension of citizenship also subjected most American

But citizenship's constitutional significance should not be exaggerated. One of the striking things about the Constitution is how seldom the word "citizen" and its derivatives are used in the document.<sup>59</sup> In general, personal constitutional rights apply to "persons," and the use of the broader term does not appear to have been an oversight. Poore states, "The Fourteenth Amendment provides equal protection for citizens of states."<sup>60</sup> Wrong. It provides equal protection for *persons*. After defining citizenship and referring to "citizens" in the Privileges and Immunities Clause,<sup>61</sup> the first section of the Fourteenth Amendment continues: "nor shall any State deprive any *person* of life, liberty, or Property, without due Process of law, nor deny to any *person* within its jurisdiction the equal Protection of the laws."<sup>62</sup> Persons are almost always the constitutionally significant entities, not citizens.

In the 1924 act Congress did not confer new procedural protections on American Indians. As far as interactions with federal and state courts were concerned, Indians already had the same rights as other persons – due process, the privilege against self-incrimination, and so on. Does Poore think that non-citizens are not protected by the Bill of Rights in criminal proceedings in the United States? Does a Frenchman have to become a U.S. citizen to be entitled to procedural protections in a U.S. court? Of course not.

Perhaps constitutional protections should apply in tribal courts, but it is hard to see what the citizenship status of American Indians has to do with that issue.

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Indians to the federal taxing regime. It eliminated the special category of "Indians not taxed" – persons not counted for purposes of determining representation and apportionment of direct taxes. See U.S. CONST. art. I, § 2, cl. 3; amend. XIV, § 2.

59. Provisions governing voting and qualifications for federal elective office include citizenship requirements. See *supra* notes 57-58. Some jurisdictional rules are expressed in terms of citizenship. See U.S. CONST. art. III, § 2, cl. 1. And the privileges and immunities clauses speak to citizenship. See U.S. CONST. art. IV, § 2, cl. 1; amend. XIV, § 1.

60. Poore, *supra* note 1, at 75.

61. "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

62. U.S. CONST. amend. XIV, § 1 (emphasis added). The Supreme Court occasionally emphasizes the significance of the Fourteenth Amendment's reference to persons rather than citizens. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (holding that, within territory of jurisdiction, Fourteenth Amendment protects all persons, including aliens with substantial connections to this country); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that Fourteenth Amendment protects resident aliens).

### III. HAS POORE PROVIDED A VISION OF THE FUTURE?

Mr. Poore is unconvincing in describing the current state of American Indian law. But I suspect that, if he cannot convince us that tribal sovereignty is already dead, his project has an alternative goal: he would like his views to guide our future. Is it possible that Poore's argument will hasten the demise of tribal sovereignty?

Anything can happen, I suppose, but I am skeptical. Of one thing I am sure: if tribal sovereignty dies, it will not be the Supreme Court administering last rites. For the Court to proclaim the death of tribal sovereignty, without Congress' first having issued an order for the execution, would require rejection of nearly two centuries of jurisprudence. No matter how negatively some Supreme Court justices view American Indian tribes,<sup>63</sup> a repudiation of that magnitude is inconceivable.<sup>64</sup>

Congress is another matter, of course. If one takes the federal plenary power doctrine seriously – and, whether one likes the doctrine or not, many American Indian law commentators do take it seriously<sup>65</sup> – perhaps Congress can eliminate American Indian law with the statutory equivalent of the stroke of a pen.<sup>66</sup>

But I do not see that, or anything else that approximates the elimination of tribal sovereignty,<sup>67</sup> happening. The post-

63. Actually, most justices have been surprisingly friendly over the years. *See* CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 120-22 (1987) (concluding that the Supreme Court, despite its faults, has generally been a protector of tribal interests).

64. Chipping away at the edges of tribal sovereignty might very well happen; it has happened often in the past. But, in light of the past ebbs and flows of American Indian law, why should we think that incremental changes will always take us closer to sovereignty's death?

65. *See supra* note 9 and accompanying text.

66. I do not necessarily accept this expansive interpretation of the plenary power doctrine – that the power to regulate commerce with the “Indian Tribes,” U.S. CONST. art. I, § 8, cl. 3, includes the power to terminate those tribes – but I will accept it for purposes of this discussion. *But see supra* note 18 (noting that the Constitution might protect some aspects of sovereignty).

67. For the record, let me express some doubt that Congress could make the Constitution applicable to tribes in the way that Poore suggests, even if we were to concede that Congress could eliminate the tribes altogether. I agree with Professor Laurence that Congress could mandate “constitution-like guarantees for persons affected by the exercise of tribal sovereignty.” Laurence, *supra* note 12, at 418-19 (footnote omitted). In that case, Congress would be exercising its plenary power, derived from the Indian Commerce Clause, over the “Indian Tribes.” *See* U.S. CONST. art. I, § 8, cl. 3. But I am not at all sure that the Constitution would permit Congress to make the tribes into the equivalents of subdivisions of the federal government, with tribal courts that are nothing but another class of federal courts. *See supra* note 16. If the tribes really have already lost all sovereign powers, they should no longer be “Indian Tribes” with special

World War II revival of support for tribal sovereignty was not a product of only Democratic administrations and Congresses. Richard Nixon, for example, made one of the strongest statements by an American politician in this century in support of tribal self-determination.<sup>68</sup>

In any event, if tribal sovereignty does disappear as a result of congressional action, it will be because the legislature determines that sovereignty has outlasted its time, not because Mr. Poore will have convinced the country of his argument's merits. Poore's argument, after all, is that sovereignty is already dead *as a matter of law*; no further congressional step is necessary. Taking the argument at face value points toward congressional inaction; it hardly provides support for further congressional evisceration of a doctrine Poore thinks is already eviscerated. If Congress has to act, it will be because Mr. Poore is wrong about the current state of the law.

#### IV. CONCLUSION

I am not opposed to wishful thinking; I do a lot of it myself. And I am more sympathetic to Mr. Poore's project than almost all other writers in the academic Indian law literature will be. I am skeptical that public policy should be blessing the idea of separate groups of racially defined peoples in the United States.<sup>69</sup> When "multiculturalism" means emphasis on differences and separation, rather than on commonalities, it is not an idea I embrace.

But Mr. Poore does not purport to be describing his ideal world; he purports to be describing the law as it is today, if only we would correctly understand what has gone before. In that respect Mr. Poore is, quite simply, dead wrong. A good imagination goes only so far.

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constitutional status. Why then do tribal courts exist at all? Even under the broadest interpretation of plenary power, can Congress simply reconstitute a group of American citizens as a subdivision of the federal government?

68. See Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS DOC. No. 213 (July 8, 1970).

69. I have expressed skepticism about the desirability of separation. See Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 BYU L. REV. 1103; Erik M. Jensen, *American Indians, Time, and the Law*, 38 CASE W. RES. L. REV. 318 (1987) (reviewing WILKINSON, *supra* note 63); see also Jensen, *supra* note 17.